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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91172492
Party	Defendant The Nunez/Martinez Partnership The Nunez/Martinez Partnership 380 n.w. 48th place miami, FL 33126 fh@hr-h.com
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Submission	Motion to Dismiss 2.132
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Date	06/11/2007
Attachments	Motion for Judgment for Failure to take Testimony.pdf (3 pages)(213523 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of: Application Serial No. 78/574867
For the mark: EMAGRECE SIM
Published in the Official Gazette on April 25, 2006

PROLINE SISTEMAS, LTDA.,	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91172492
	)	
THE NUNEZ/MARTINEZ PARTNERSHIP	)	
	)	
	)	
Applicant.	)	
	)	

MOTION FOR JUDGMENT FOR OPPOSER'S FAILURE TO PROVE ITS CASE

COMES NOW Applicant, The Nunez/Martinez Partnership ("Applicant" or "Nunez/Martinez") by and through its undersigned counsel, and hereby moves for judgment based on Opposer, Proline Sistemas, Ltda.'s ("Opposer" or "Proline") failure to prove its case and sets forth as follows:

On August 22, 2006 Opposer filed its Notice of Opposition. On the same day the Board set the date for Opposer's thirty (30) day testimony period to close as June 8, 2007 (D.E. 2). However, since that time, Opposer has taken no discovery, has taken no testimony, has offered no evidence, and is therefore unable to prove its case.

In its Notice of Opposition, Opposer alleged that its applied for mark, "EMEGRECESIM", Serial No. 78/739312 is registered in Brazil (D.E. 1 at ¶ 5), has been continuously used in United States commerce since at least as early as October 29, 2004 (D.E. 1 at ¶ 7), that "Defendant's application for registration of the mark came after the mark became famous" (D.E. 1 at ¶ 14), that "[t]he two marks are very similar and are likely to cause consumer confusions" (D.E. 1 at ¶ 9), that Opposer's mark "has gained sufficient notoriety as to be considered a famous and distinctive mark" (D.E. 1 at ¶ 12), that Applicant's use of its mark would dilute the strength of Opposer's alleged mark (D.E. 1 at ¶ 15), that "Plaintiff will be damaged by consumer confusion and other damage

if Defendant's mark is registered" (D.E. 1 at ¶ 10), and that registration of the Applicant's mark should therefore be denied.

Since that time, Opposer has had ample opportunity to conduct extensive discovery and to gather and introduce evidence as to the allegations set forth in Opposer's Notice of Opposition. Specifically, the Discovery Period opened on September 11, 2006 and closed on March 20, 2007. Also, Opposer's Testimony Period opened on April 9, 2007 and closed on June 8, 2007. However, during this time **Opposer did not take any discovery** and **Opposer did not take any testimony or offer any other evidence**. Instead, Applicant propounded discovery in the form of Requests for Admissions, Requests for production and Interrogatories on March 9, 2007, but has yet to receive any response to same. As such, it is clear that Opposer has no intention of prosecuting this case. Judgment should be entered against same for such failure to prosecute.

Memorandum of Law

The Trademark rules of Practice permit the filing of a motion for judgment directed to the sufficiency of Opposer's trial evidence (or lack thereof) in two particular situations: 1) when Opposer's testimony period has passed, and Opposer has not taken testimony or offered any other evidence; and 2) when Opposer's testimony period has passed, and Opposer has offered no evidence other than copies of PTO records. See TBMP §§ 534.02 and 534.03. As is the case here, when Opposer's testimony period has passed, and Opposer has not taken testimony or offered any other evidence Applicant may, without waiving its right to offer evidence in the event the motion is denied, move for dismissal for failure to prosecute. See TBMP §§ 534.02.

In ruling on this Motion, the Board should recognize that Opposer brought this action and in so doing took responsibility for moving forward in accordance with the trial schedule. See PolyJohn Enterprises Corp. v. 1-800-Toilets, Inc., 61 U.S.P.Q.2d 1860 (TTAB 2002); see also Atlanta-Fulton County Zoo, Inc. v. DePalma, 45 U.S.P.Q.2d 1858, 1860 (TTAB 1998). Since Opposer has failed to take such responsibility the Board is justified in, and should enforce its procedural rules and grant Applicant's Motion for Judgment. See PolyJohn Enterprises Corp. v. 1-800-Toilets, Inc., 61 U.S.P.Q.2d 1860 (TTAB 2002); see also Hewlett-Packard, Co. v. Olympus, Corp., 931 F.2d 1551, 1554 (Fed. Cir. 1991).

WHEREFORE, Applicant, The Nunez/Martinez Partnership requests that the Board grant its Motion for Judgment for Opposer's Failure to Prove its Case and dismiss the instant proceeding with prejudice.

June 11, 2007

Respectfully submitted,
Applicant

By: s/GUSTAVO SARDIÑA
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CERTIFICATE OF ELECTRONIC FILING USING ESTTA

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically using the Board's ESTTA online filing system this 11th day of June, 2007.

s/GUSTAVO SARDIÑA
Frank Herrera
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Gustavo Sardiña
Florida Bar No. 31162

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy was served via United States mail, postage pre-paid this 11th day of June 2007, on Daniel Augustyn, AUGUSTYN LAW OFFICE, 770 N. Cotner Blvd. Suite 114, Lincoln, Nebraska, 68505.

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